DATO' JAFFAR MOHD ALI & ANOR *a*

v.

JASATERA BHD & ORS

COURT OF APPEAL, KUALA LUMPUR *b*
GOPAL SRI RAM JCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: B-02-890-99]
24 JANUARY 2000 *c*

CIVIL PROCEDURE: *Appeal - Appeal against interlocutory order - Trial judge refusing injunctive relief - Whether trial judge failed to ask right question - Courts of Judicature Act 1964 - Section 69(4) - Exercise of powers thereof by Court of Appeal*

On 31 December 1998, the respondents passed a resolution removing certain directors of the first respondent company. Being apparently aggrieved, the appellants filed a summons applying for certain injunctive reliefs. The application was dismissed by the learned judge on the grounds, inter alia, that the directors were not removed but had vacated their office by reason of their failure to attend meetings. The appellants appealed and argued that the trial judge had not exercised his discretion correctly and had gone wrong on the question of whether the *status quo* ought to be maintained. Before the Court of Appeal, a question hence arose as to whether the learned judge had asked himself the right question when considering the issue of maintaining the *status quo.* *d* *e* *f*

Held:
Per Gopal Sri Ram JCA

[1] The learned judge had asked himself the wrong question. The learned judge should have directed his mind to the *status quo* as at the time of the impugned meeting of 31 December 1998, *ie*, as at the date of the passing of the impugned resolutions. Consequently, he should have concerned himself with the question whether the *status quo* prevailing immediately before the passing of the impugned resolutions should be maintained. Unfortunately, the learned judge did not do that. Instead, he only directed his mind to the circumstances existing at the time of the application. He had thus fallen into error. *g* *h*

[2] If the learned judge had addressed his mind to the circumstances in which the resolutions were passed, he would not have come to the conclusions he did. This, therefore, is an appropriate case for appellate intervention. *i*

[3] The appeal is allowed and the order of the learned judge is set aside. However, it is not proper to grant an order in terms of the appellants' summons, and accordingly, relief is declined in respect of prayers 1, 2 and 3 of the summons. It is however appropriate for this court to invoke s. 69(4) of the Courts of Judicature Act 1964 and act upon the prayer for further or other relief. An injunction is hence granted restraining the respondents from implementing the impugned resolutions passed on 31 December 1998.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pada 31 Disember 1998, responden-responden telah meluluskan satu resolusi yang memberhentikan pengarah-pengarah tertentu syarikat responden pertama. Nyatanya terkilan, perayu-perayu tersebut telah memfailkan satu saman satu saman memohon untuk relief-relif injunktif tertentu. Permohonan tersebut telah ditolak oleh hakim yang bijaksana atas alasan, antara lainnya, bahawa pengarah-pengarah tersebut telah tidak diberhentikan tetapi telah mengosongkan jawatan mereka kerana kegagalan mereka untuk menghadiri mesyuarat-mesyuarat. Perayu-perayu tersebut telah merayu dan berhujah bahawa hakim perbicaraan telah tidak melaksanakan budibicaranya dengan betul dan telah salah atas persoalan samada *status quo* harus dikekalkan. Di hadapan Mahkamah Rayuan, satu soalan telah berbangkit mengenai samada hakim yang bijaksana tersebut telah menanyakan dirinya sendiri persoalan yang betul ketika mempertimbangkan isu mengekalkan *status quo* tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Hakim yang bijaksana telah menanyakan dirinya soalan yang salah. Hakim yang bijaksana tersebut seharusnya menumpukan pemikirannya kepada *status quo* pada waktu mesyuarat yang dipersoalkan itu bertarikh 31 Disember 1998, iaitu pada tarikh meluluskan resolusi-resolusi yang dipersoalkan itu. Akibatnya, beliau seharusnya mengambil berat dengan persoalan samada *status quo* yang terdapat sejurus sebelum meluluskan resolusi-resolusi yang dipersoalkan itu seharusnya dikekalkan. Malangnya, hakim yang bijaksana tidak melakukan sedemikian. Sebaliknya, beliau hanya menumpukan pemikirannya kepada keadaan-keadaan yang wujud ketika permohonan tersebut. Beliau telah dengan itu melakukan kesilapan.

[2] Jika hakim yang bijaksana telah menumpukan pemikirannya kepada keadaan-keadaan dalam mana resolusi-resolusi tersebut telah diluluskan, beliau tidak akan mencapai kesimpulan yang telah dicapainya itu. Oleh itu, ini merupakan satu kes yang wajar untuk pencelahan pihak rayuan.

[3] Rayuan tersebut telah dibenarkan dan perintah hakim yang bijaksana diketepikan. Walaubagaimanapun, ianya tidak wajar untuk memberikan satu perintah seperti yang dipohon oleh saman perayu-perayu, dan sehubungan itu, relief dinafikan berhubung dengan pohonan-pohonan 1, 2 dan 3 saman tersebut. Adalah walaubagaimanapun wajar bagi mahkamah ini untuk menggunakan s. 69(4) Akta Mahkamah Kehakiman 1964 dan bertindak ke atas pohonan untuk mendapatkan relief yang selanjutnya dan yang lain. Satu injunksi adalah dengan itu diberikan menghalang responden-responden daripada melaksanakan resolusi-resolusi yang dipersoalkan itu yang telah diluluskan pada 31 Disember 1998.

[Rayuan dibenarkan; perintah sehubungan itu.]

Case(s) referred to:
Garden Cottage Food Ltd v. Milk Marketing Board [1984] AC 130 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(4)

For the appellants - S Kulasegaran (Aneeta Kulasegaran & Visalrani with him); M/s Ranjit, Thomas & Kula
For the respondents - Ngeow Yin Ngee (BK Seah & MC Loke with him); M/s Loke & Assoc

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the decision of the learned judge of the High Court at Shah Alam refusing the injunctive relief sought by the appellants. The factual matrix against which this application was filed is sufficiently set out in the judgement of the learned judge and we do not propose to repeat it here. The substance of the dispute relates to the alleged removal of certain directors of the first respondent company at the board meeting held on 31 December 1998.

The respondents had argued in the court below – and these arguments were repeated before us – that there was no removal but a mere vacation of office in accordance with the articles of association. Mr. Ngeow for the respondents has carefully taken us through the judgment of the learned judge in order to demonstrate two points.

First, that the two directors, Datuk Yeop Adlan bin Che Rose (the second appellant) and Mr. Tan Seng Chai (not a party to the proceedings) were not removed. It was said that they had, by reason of their failure to attend meetings, vacated their office according to art. 91(g) of the articles of association. That article reads as follows:

> 91. The office of director shall become vacant if the director:
>
> (g) is absent without the previous sanction of the board of directors for more than six (6) successive directors' meetings, and his alternate director (if any) shall not during such period have attended in his stead from meetings of the directors held during that period and the directors resolve that his office be vacated.

Secondly, Mr. Ngeow sought to argue that the learned judge had addressed his mind to relevant matters in the case and exercised his discretion correctly. Counsel also reminded us that this case concerns the judge's exercise of discretion and that it ought not to be interfered with.

The principles upon which an appellate court may interfere with the exercise of discretion are set out in Lord Diplock's speech in *Garden Cottage Food Ltd. v. Milk Marketing Board* [1984] AC 130 where he said (at p. 137):

> The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

For the appellants, Mr. Kulasegaran has argued that the learned judge went wrong principally on the question of whether the *status quo* ought to be maintained. As to what is meant by the expression "status quo", Lord Diplock said in *Garden Cottage (ibid)*, as follows (at p. 140):

> The history of the trading relations between the company and M.M.B., as I have outlined them, make it difficult to identify what was the relevant status quo which it was said in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 it is a counsel of prudence to preserve when other factors are evenly balanced. The *status quo* is the existing state of affairs; but since states of affairs do not remain static this raises the query; existing when? In my opinion, the relevant *status quo* to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant *status quo.*

Since this is an appeal against an interlocutory order, any pronouncement we made may affect the mind of the trial judge. Hence the less we say of the merits of the case the better. It is therefore emphasised that nothing we say in this judgment is meant to be taken as a direction as to what findings are to be made after all the evidence has been taken. However, we are most concerned with the question whether the judge asked himself the right question when considering the issue of maintaining the *status quo.*

Having considered to Mr. Kulasegaran's submissions we agree with him that in the light of the factual matrix and historical background of the case, the learned judge did in fact ask himself the wrong question. Unfortunately, he only directed his mind to the circumstances existing at the time of the application. In our view, he should have directed his mind to the *status quo* as at the time of the impugned meeting of 31 December 1998 ie, as at the date of the passing of the impugned resolutions. Consequently, he should have concerned himself with the question whether the *status quo* prevailing immediately before the passing of the impugned resolutions should be maintained. He did not do that. It is here that he fell into error.

The learned judge quite rightly held that there are serious questions to be tried. Having read the evidence on record referred to us during argument by both Mr. Kulasegaran and Mr. Ngeow, we are satisfied that a cloud exists over the question on whether there was a removal or vacation.

Having carefully considered this matter, we have come to the conclusion that the learned judge failed to address his mind correctly on the all-important question of *status quo* and we consider this is an appropriate case for appellate intervention. If the learned judge had addressed his mind to the circumstances in which the resolutions were passed, he would not have come to the conclusion he did.

We therefore allow the appeal and set aside the order of the judge. However, we agree with Mr. Ngeow that it is not proper, in the circumstances of the present case, to grant an order in terms of the appellant's summons. Accordingly, we decline the relief sought in prayers 1, 2 and 3 of the appellant's summons. This is, however, an appropriate case for the exercise of the powers conferred upon us by s. 69(4) of the Courts of Judicature Act 1964. We therefore act upon the prayer for further or other relief contained in the appellant's summons and grant injunction restraining the respondents from implementing the impugned resolutions passed on 31 December 1998.

The appellant will have the costs at all levels. The deposit paid into court shall be refunded to the appellant. We direct an early trial of the action. So that there will be no further delay, we also direct that the suit be fixed for mention tomorrow (26 January 2000) at 9am before the High Court at Shah Alam to enable counsel to appear before the learned judge to obtain directions as to the further conduct of the action.